

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEAN EVERETT DAVIS,

Defendant-Appellant.

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UNPUBLISHED

January 14, 2010

No. 287481

Genesee Circuit Court

LC No. 08-022407-FH

Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

PER CURIAM.

A jury convicted defendant of manslaughter, MCL 750.321, first-degree fleeing and eluding, MCL 750.479a(5) (resulting in death), two counts of second-degree fleeing and eluding, MCL 750.479a(4)(a) (resulting in serious injury), and resisting and obstructing a police officer, MCL 750.81d(1). The trial court sentenced defendant to prison terms of 10 to 15 years for both the manslaughter conviction and the first-degree fleeing and eluding conviction, six to 10 years for each second-degree fleeing and eluding conviction, and 16 to 24 months for the resisting and obstructing a police officer conviction. Defendant appeals as of right. We affirm.

This case arises out of a police chase and resulting fatal motor vehicle accident on October 16, 2007. A Michigan State Police Trooper observed defendant's car coming toward him as he was driving, and that the car was visibly braking. The radar in the trooper's vehicle indicated that the car was going 70 miles per hour in a 55 mile per hour speed zone. The officer saw defendant's car fail to stop for a nearby four-way stop and nearly hit another car. The officer turned to follow defendant, activating his lights and siren. Defendant did not stop in response.

As the officer followed him, defendant cut through a parking lot to avoid a traffic light, cut through a field, drove around a house in an effort to change direction on the road, and drove through another grassy area. The officer noted that it was raining that day and there were other cars on the roads. Defendant passed multiple cars during the chase. The chase occurred at speeds between 80 and 110 miles per hour.

During the chase, defendant passed another car on a hill and the officer was unable to keep pace with him. After the officer crested the hill, he saw that defendant had been involved in an accident with two other vehicles. A video of the chase, taken from the officer's patrol car, was admitted into evidence and played for the jury.

Timothy Robbins, a traffic reconstruction specialist for the Michigan State Police, testified that defendant's car approached Linda Haney's truck from behind at a high rate of speed, attempting to pass it on the right-hand shoulder of the road. Instead of passing it, defendant's car struck Haney's truck on the right rear side of the truck and pushed Haney's car into a head-on collision with an oncoming truck, driven by Ronnie Chambers. Robbins testified that the cause of the accident was defendant's failure to slow down and avoid rear-ending Haney's truck, sending Haney's truck into a collision with Chambers's truck.

When the officer arrived at the scene, defendant had exited his car and was running into a cornfield where the corn stalks were six to eight feet high. The officer radioed for assistance and went to help the victims of the accident rather than pursue defendant.

Haney was killed in the accident. Haney's passenger, Rogers, was in the hospital for 28 days following the accident. She underwent four surgeries to repair her broken ankle and legs. She continues to undergo physical therapy and use a walker. She remains unable to be left alone or take care of herself. Chambers had to be removed from his truck using the "jaws of life." He was in the hospital for three weeks with multiple injuries to his left foot and leg, and a punctured diaphragm. He had rods and pins placed in his leg and foot, but ultimately had his left foot amputated because of the unlikelihood of a full recovery of the foot. He has not walked since the accident.

The police were originally unable to find defendant, including after a search by a K-9 unit. He was found and arrested later on the day of the accident in some nearby woods by a fugitive team from the Flint Police Department. Defendant resisted arrest and struggled to get away from the officers who found him. They had to trip him, punch him, and use a taser to subdue him.

Defendant first argues that the trial court improperly departed from the minimum sentencing guidelines range. A trial court's reasons for a sentencing departure are reviewed for clear error. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). Whether a given reason is objective and verifiable is a question of law that is reviewed de novo. *Id.* Whether the reasons are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion. *Id.*

A trial court may depart from the sentencing guidelines if the "court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). To be substantial and compelling, the reasons cited by the trial court must be objective and verifiable, they must "keenly or irresistibly grab" the court's attention, and they must be of "considerable worth" in deciding the length of the sentence. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003).

At the sentencing hearing, the prosecutor urged the trial court to depart from the minimum guidelines range of 43 to 86 months:

Judge, I'd ask you to recount the testimony that the (inaudible), the aggravated circumstances, by which, Mr. Davis brought himself before the Court. Killed Mrs. Haney, injured Mr. Chambers, injured terribly Mrs. Rogers, fleeing

and eluding the police numerous miles. Passing cars on the left and the right on the shoulder, speeds up to 120 miles per hour and to op it off, the Court has information, by way of motion, that defendant did do this before in 1995. It was a misdemeanor back then; and he acknowledged at that time when he was caught, speeding from the police, high speed, crashing into a police car, that his behavior could have killed somebody. And here we are today, some years later, he did just that. And that just doesn't really get taken into account of what the scoring of those guidelines, Judge. And for that reason, Judge, I'd ask you to exceed those guidelines, give him the statutory maximum of 120 months to 180.

After hearing from both defense counsel and defendant, the trial court stated in part:

And this incident, this unfortunate incident occurred October 16, of 2007, just a little afternoon or around noon. And we have had a trial relating to this matter and heard extensive testimony, in addition we had the video tape in the cruiser that was played for the Court and the jury during the trial, which showed the extreme situation that day. Driving, as he pointed out speeding initially, which could have resulted in nothing more than a ticket. But, unfortunately, he chose to continue and not heed the Trooper and in the course of that obviously endangered the police and numerous civilians. He caused [sic] Mrs. Haney her life, Mr. Chamber's foot, Ms. Rogers her health and much suffering in the last 10 months. And the best I can make out is he was trying to meet his wife for lunch because he had missed the anniversary the day before. And he was determined to get up to this place where she works so he could make up for the fact he was in the dog house having missed their anniversary the night before. He was very purposeful and goal oriented and he could have taught the school for precision driving the way you drove; I don't know where you learned to drive like that, but I saw the video tape when Mr. Larobardiere played it. And obviously he drove on the road and off the road. Over the fields, I mean, it's like Thanksgiving, over the river and through the fields to grandmother's house. He was everywhere on the road, including as we know, at the very end when this horrible accident occurred.

He also testified and he definitely knew the Troopers were there, he definitely knew the difference between right and wrong, and that he should stop, but he chose not to do so.

And having heard everything and the Court believes I should depart upwards on the sentencing guidelines . . . And if anyone sees the video of the cruiser that was taken during this incident they would understand this was not a two block or a ten block incident, this was more like ten miles of serious pursuit by the police, and driving by Mr. Davis, in a way the Court has never seen before. So I do find substantial and compelling reasons to depart upwards on counts I and II.

Defendant first argues that the conduct cited by the court to justify an upward departure was not substantial and compelling because the conduct did not exceed the conduct necessary for the offenses of which he was convicted. He argues that the danger of his conduct during the chase was that others would be injured or killed, but his convictions for manslaughter and fleeing

and eluding resulting in death already covered this possibility and, thus, his conduct was not *more* dangerous than that contemplated by the offense for which he was convicted. Defendant misunderstands the trial court's assessment of the dangerousness of defendant's conduct. The trial court noted that defendant drove at high speeds on and off the road for ten miles, endangering both the Michigan State Trooper who was following him, as well as other civilian bystanders.

Defendant also argues that his conduct while driving is not an objective and verifiable fact. An objective and verifiable fact is one that is external to the mind of the decision-maker and capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The trial court specifically cited the trooper's video of the chase, showing defendant driving at speeds of up to 110 miles per hour, through parking lots, onto lawns, and around houses. These facts are plainly objective and verifiable. The trial court did not err when it concluded that defendant's conduct justified a departure from the minimum sentencing guidelines range.

Defendant next argues that the sentences were not proportionate to the offense or to defendant. As noted, defendant's minimum sentencing guidelines range was 43 to 86 months; the trial court sentenced defendant to minimums of 10 years—120 months. The magnitude of a sentencing departure is reviewed for an abuse of discretion. *Smith, supra* at 300.

A trial court must not only justify its decision to depart from the sentencing guidelines, but must justify the magnitude of the departure. *Smith, supra* at 303-304. There are two components to this second requirement. *Id.* at 304. First, the trial court must specifically articulate why its departure is more proportionate than a sentence within the guidelines, "sufficient to allow for effective appellate review." *Id.* Second, the sentence must, in fact, be proportionate. *Id.* at 304-306.

Here, the trial court did not base its departure on characteristics already taken into account. It is clear from the trial court's comments that it found that defendant subjected numerous people to a very dangerous situation when he sped away and engaged in a high speed chase with the police, all the while driving in an extremely dangerous manner. Although the number of victims who were actually killed or injured by defendant's behavior was already scored in the guidelines, the court properly noted that defendant led police on a chase for numerous miles at speeds up to 120 miles per hour, placing many other civilians and the police officers at risk. The scoring of the victims in the guidelines was not adequate based upon the nature of the dangers presented in this case. Further, the guidelines did not take into account the fact that defendant engaged in similar conduct in 1995. The trial court did not abuse its discretion in determining that there were substantial and compelling reasons to justify the departure sentence that it imposed, and the sentence imposed is proportionate to the offense and the offender.

Defendant finally argues that his separate convictions and sentences for first-degree fleeing and eluding, and two counts of second-degree fleeing and eluding, arising out of the same police chase, constitute a double jeopardy violation. Defendant failed to raise this issue before the trial court and, therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999).

Whether punishment for multiple offenses violates double jeopardy is ordinarily analyzed under the federal *Blockburger*<sup>1</sup> test. *People v Smith*, 478 Mich 292, 315-316; 733 NW2d 351 (2007). Under this test, punishment for multiple offenses is permissible as long as each offense requires proof of an element not required of the other offense. *Id.* at 302-303. However, even if the offenses contain the same elements, there is no double jeopardy violation if the Legislature clearly intended to impose multiple punishments. *Id.* at 315-316. Defendant concedes that the *Blockburger* test is not availing in this case and instead argues that the Legislature clearly intended to preclude punishment for multiple convictions of fleeing and eluding arising out of the same transaction. The primary rule for determining legislative intent is that statutory language is to be strictly construed according to its plain meaning. *People v Noble*, 238 Mich App 647, 658-659; 608 NW2d 123 (1999).

The fleeing and eluding statute provides:

(1) A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop shall not willfully fail to obey that direction by increasing the speed of the vehicle, extinguishing the lights of the vehicle, or otherwise attempting to flee or elude the police or conservation officer. This subsection does not apply unless the police or conservation officer giving the signal is in uniform and the officer's vehicle is identified as an official police or department of natural resources vehicle.

\* \* \*

(4) Except as provided in subsection (5), an individual who violates subsection (1) is guilty of second-degree fleeing and eluding, a felony punishable by imprisonment for not more than 10 years or a fine of not more than \$10,000.00, or both, if 1 or more of the following circumstances apply:

(a) The violation results in serious impairment of a body function of an individual.

\* \* \*

(5) If the violation results in the death of another individual, an individual who violates subsection (1) is guilty of first-degree fleeing and eluding, a felony punishable by imprisonment for not more than 15 years or a fine of not more than \$15,000.00, or both. [MCL 750.479a.]

Defendant's three fleeing and eluding convictions arise out of the injuries suffered by three separate victims as a result of his behavior, including the death of one victim.

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<sup>1</sup> *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

Defendant notes that this Court has previously observed that heightened sentencing for aggravating circumstances based on a common set of elements for an offense is evidence that the Legislature did not intend multiple convictions and sentences for the same conduct. See *People v Meshell*, 265 Mich App 616, 630; 696 NW2d 754 (2005). MCL 750.479a does indeed have this kind of structure. Nevertheless, there is clear evidence of a different intent by the Legislature in MCL 750.479a(8):

Except as otherwise provided, a conviction under this section does not prohibit a conviction and sentence under any other applicable provision for conduct arising out of the same transaction. A conviction under subsection (2), (3), (4), or (5) prohibits a conviction under section 602a of the Michigan vehicle code, 1949 PA 300, MCL 257.602a, for conduct arising out of the same transaction.

The Legislature clearly intended, with the addition of this subsection, to permit multiple convictions and punishments for conduct arising out of the same transaction, with one exception: convictions under MCL 257.602a, a nearly identical statute to MCL 750.479a, found in the Michigan Vehicle Code. There is, however, no exception prohibiting multiple punishments for multiple victims under MCL 750.479a.

Defendant also attempts to argue that “any other provision” means any statute besides MCL 750.479a, but not another subdivision of MCL 750.479a. We do not find this to be a reasonable interpretation of this language. First, the subsection refers to MCL 750.479a as “this section” rather than “this provision.” Thus, there is no reason to believe that the Legislature intended for its use of “any other provision” to be exclusive of MCL 750.479a. Further, this point is reiterated by the fact that the Legislature *specifically* excluded additional convictions and sentences under only one statute, MCL 257.602a, without mentioning anything about the possibility of additional convictions from within MCL 750.479a. The Legislature’s level of specificity in this second sentence of MCL 750.479a(8) raises a reasonable inference that it intentionally excluded MCL 750.479a from the list of exceptions. *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995) (the express mention of one thing excludes other similar things).

Affirmed.

/s/ Mark J. Cavanagh  
/s/ E. Thomas Fitzgerald  
/s/ Douglas B. Shapiro